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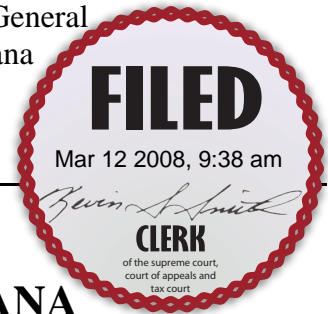
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**IN THE
COURT OF APPEALS OF INDIANA**

NORMAN L. WEST,

Appellant-Petitioner,

vs.

STATE OF INDIANA,

Appellee-Respondent.

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No. 82A05-0707-PC-397

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable J. Douglas Knight, Judge
Cause No. 82D02-9911-CF-911

March 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Norman L. West appeals the denial of his petition for post-conviction relief. We affirm.

Issue

West presents a single issue for our review, which we restate as whether the post-conviction court erred in denying his petition for post-conviction relief.

Facts and Procedural History¹

On October 28, 1999, at approximately 2:30 a.m., West's neighbor, Lisa Schlieper overheard West arguing with his girlfriend, Theresa June Hart,² through the wall of her Evansville apartment. During the argument, Schlieper heard West threaten to kill Hart if she did not "shut up." R. at 71. Schlieper also heard objects crashing against the wall. The argument ended abruptly at 3:30 a.m.

West left for work at 7:30 a.m., locking the door behind him. *Id.* at 367. While West was at work, Robert Black, a neighboring tenant who was having a sexual relationship with Hart, knocked on the door to West's apartment twice but received no response.

West returned to the apartment at approximately 5:15 p.m. From about 6:00 to 6:20 p.m., West visited with Black in Black's apartment. Shortly after leaving Black's apartment, West ran back and said that he thought Hart was dead.

¹ The following abbreviations are used to cite the various documents submitted in this appeal. "App." refers to the appellant's appendix. "R." refers to the three-volume record of proceedings from the original proceeding. "PCR Tr." refers to the transcript of the post-conviction relief hearing. "PCR Ex." refers to the volumes of exhibits offered during the post-conviction relief hearing.

² The State refers to the victim as Theresa Hunt. However, the charging information, the post mortem examination report, and the trial transcript refer to the victim as Theresa June Hart. R. at 8, 51, 121.

Hart's body was found at approximately 6:30 p.m., stiff and cold. Hart's body also bore multiple bruises, contusions, and abrasions of varying ages.

At 8:55 p.m., West gave a statement ("October 28 Statement") to Detective Larry Nelson at police headquarters, in which he stated that Hart had woken up sick in the middle of the night. He also said that Hart was awake when he left for work and that he kissed her goodbye.

On October 29, 1999, the pathologist performed an autopsy on Hart and determined that the cause of death was manual strangulation. Although he was unable to pinpoint the exact time of death, the pathologist opined that death occurred in the early morning hours of October 28 based on the fact that rigor mortis develops between ten and fifteen hours after death and rigor mortis in the lower extremities of Hart's body was totally formed at about 8:50 p.m. on October 28.

Also on October 29, 1999, around 5:00 p.m., Detective Nelson brought West to police headquarters for additional questioning. Upon their arrival, they discovered that a warrant for West's arrest had already been issued. Detective Nelson began a videotaped interview of West ("Videotaped Interview") that was not transcribed. The video shows that Detective Nelson entered the interview room at 5:04 p.m. At about 5:07, Detective Nelson discussed the findings of the autopsy, explaining to West that Hart did not die of natural causes. At 5:09, Detective Nelson advised West of his *Miranda* rights. After that, the two discussed a variety of issues, including potential suspects and clarification of the events of October 28. Detective Nelson left the room at 5:38 and returned at 5:44. He then informed West that Hart

had been strangled and accused West of accidentally killing Hart during a fight. West vehemently and repeatedly denied killing Hart. At 5:49, Nelson stated, “Yeah, you killed her.” PCR Tr. at 11; PCR Ex. B. West replied, “No, you’re wrong. Am I under arrest? Alright. Well, I want to see a lawyer.” *Id.* About five seconds passed, and West said, “She was alive when I left.” *Id.* For another thirteen minutes, Detective Nelson continued to accuse West of accidentally killing Hart, and West continued to deny it. Then, the following exchange took place:

[Nelson]: Norman, it’s hard. It’s hard I know.

[West]: I’m sorry, I didn’t do it. I didn’t do it, and that’s all I want to say.

[Nelson]: I can tell just by lookin’ at you that you did it.

[West]: *I don’t care. That’s all I want to say.*

[Nelson]: You do care. That’s the problem. Norman, you do care. You’re not a murderer. You do care. That’s the whole problem here. Do you understand? I care. I know you care. I saw you yesterday. I know you care.

[West]: But, I didn’t hurt her. I didn’t do it.

[Nelson]: You do care, Norman. Are you afraid you’re gonna get eighty years?

[West]: No. I didn’t do it, and I don’t cop to anything I didn’t do.

[Nelson]: I’m not tellin’ you to cop. I’m tellin’ you to tell the truth.

[West]: I did.

[Nelson]: You didn’t tell the truth about anything else.

[West]: Yes, I have.

Id. at 13-14 (emphasis added).

Detective Nelson left the room at 6:03 and returned at 6:10, at which time he said, “Earlier, you asked for a lawyer ... And, I want to make sure. Do you want a lawyer?” *Id.* at 14-15. West replied, “No. Not right now.” *Id.* at 15. Detective Nelson then said, “Okay. Now, what we’re trying to do is get to the bottom of things. I’ll tell you, all the indications and what I did to you a while ago was kind of a ploy that we use when we’re interviewing people.” *Id.* Both men left the room two minutes later, and West returned with a soda. The video ends at 6:25 p.m.

Over the next few hours, West submitted to a polygraph examination, had several discussions with Detective Nelson, and spoke to Captain Clayton Grace during breaks. PCR Tr. at 31; R. at 346-47, 396-97. At some point, Detective Nelson determined that he would make no further progress with West, and Captain Grace asked to speak to him. During this conversation, West admitted that he had been angry with Hart and that they argued about several different things. R. at 399-401. The argument ended when Hart kned him in the back, and he immediately rolled over and grabbed Hart by the throat. *Id.* at 400-01. Hart’s eyes opened wide, and he let go and rolled over and fell asleep. *Id.* at 401. West told Captain Grace that he did not think that he held her throat long enough to hurt her. *Id.* Captain Grace asked West to demonstrate how he had grabbed Hart. West agreed. The two men lay down on the floor, and West showed Captain Grace how he had grabbed Hart. *Id.* at 402. West then agreed to make a statement regarding the information he had just told Captain Grace.

At 11:58 p.m., West began making a recorded statement (“October 29 Statement”) in which he admitted that sometime after 2:00 a.m., he grabbed Hart’s neck and yelled, “shut up

you dumb bitch!” *Id.* at 355, 359. He stated that he held her neck only three or four seconds. *Id.* at 356. West also stated that he was not mistreated by the police and that he provided the statement of his own free will. *Id.* at 372.

On October 29, 1999, the State charged West with murder.³ On May 23, 2000, a jury trial commenced. During the trial, the State introduced West’s October 28 Statement and October 29 Statement. Defense counsel also submitted the Videotaped Interview. On May 26, 2000, a jury found West guilty as charged. On June 30, 2000, the trial court sentenced West to sixty years. West appealed, and on November 16, 2001, our supreme court affirmed West’s conviction and sentence. *West v. State*, 758 N.E.2d 54 (Ind. 2001).

On August 9, 2002, West filed a pro se petition for post-conviction relief. On October 27, 2006, West, by counsel, filed an amended petition for post-conviction relief, alleging that “West was denied effective assistance of counsel as guaranteed by the Sixth and Fifth Amendments to the United States Constitution and Article One, Section Thirteen of the Indiana Constitution, when his trial attorney, Timothy Dodd, failed to move to suppress any statements West made to police after West invoked his right to counsel.” App. at 33. On March 16, 2007, a hearing was held on West’s petition. On June 7, 2007, the post-conviction court issued its finding of facts and conclusions thereon, denying West’s petition and including the following relevant provisions:

FINDINGS OF FACT

....

4. On March 2, 2000, [West’s] trial attorney moved to have updated reports on the victim’s drug and alcohol screens, if any.

³ Ind. Code § 35-42-1-1(1).

5. On May 23, 2000, trial by jury began. [West's] trial attorney objected to the testimony of Victoria Lynn Hart^[4] and State's Ex. 1,^[5] which was overruled but the court showed a continuing objection during the presentation of testimony and any reference to State's Ex. 1.

6. On May 25, 2000, trial by jury continued. [West's] trial attorney moved for a mistrial this date which was denied by the court. The court admonished Juror #10 to not take any further notes. The court retained this juror's notes and sealed the same and marked as Court's Ex. 1. [West's] trial attorney then renewed the motion for mistrial which was denied. Mr. Dodd then made a motion pursuant to TR 50^[6] which was also denied.

7. On May 26, 2000, trial by jury continued. Mr. Dodd questioned [West] on the limited basis concerning his right to testify in his own behalf. [West] did not testify and the Defense rested. [West's] trial attorney made an objection to the final jury instructions but did so after the reading of the instructions to the jury.

....

14. At the hearing on the amended [post-conviction] petition, Mr. Dodd testified that he has approximately forty-one (41) years of experience as an attorney and has participated in approximately one hundred-fifty (150) criminal trials. When asked by petitioner's post-conviction relief attorney about why he did not file a motion to suppress the statements made by [West] during the interview at issue, Mr. Dodd testified that he could not precisely recall why he had not moved to suppress West's statement to the Police. However, Mr. Dodd opined at some length that since [West] denied culpability throughout the interrogation it would be possible to put those statements into evidence and not subject [West] to any cross examination. Thus, Mr. Dodd was balancing all the factors involved in the case and seeking the best result for [West] at his trial. Here specifically, West's denials were heard by the jury without West being exposed to cross examination by the State.

....

17. In regards to the voluntary statement of October 29, 1999, which was recorded on the DVD and not transcribed, [West] was read his *Miranda* rights by the detective and [West] affirmed that he understood and then waived these rights. [West] engaged in conversation with the detective and continued to answer questions. Throughout the recorded interview, [West] denied any responsibility for the victim's death even after confronted with results from the

⁴ Victoria is Hart's sister. Mr. Dodd objected based on surprise because her name was not on the witness list. R. at 46.

⁵ State's Exhibit I is a picture of Hart three years prior to her death.

⁶ Indiana Trial Rule 50 governs judgment on the evidence.

autopsy and that it was the doctor's opinion that the victim did not die of natural causes.

18. At one point during the voluntary statement of October 29, 1999, [West] gave police consent to enter his apartment, the scene of the crime, and retrieve a certain trash container. [West] can be seen on the DVD video exhibit reading and signing a "consent to search form" and he then continued to talk, answer questions and cooperate with the police investigation. [West] offered a key to his home to the police to assist in the search and he described where the trash container at issue could be located within the apartment.

19. Later, during the same video recorded statement, [West] was again confronted with autopsy information and was questioned about his role in the victim's death. [West] said, "I want to see a lawyer." The detective immediately followed with, "It's up to you. That is up to you." Then, after a pause, silence and consideration by [West] he knowingly initiated further communication with the police detective by voluntarily stating, "She was alive when I left." To this initiation of the conversation by [West's] statement the detective replied, "Not according to the doctor."

20. Several minutes later the detective left [West] alone in the interview room. Several more minutes pass and the detective then returned to the interview room. The detective then said to [West], "Earlier you asked for a lawyer and I need to make sure – Do you want a lawyer?" [West] replied, "No, not right now."

....

CONCLUSIONS OF LAW

....

[West's] Criminal Trial Attorney Provided Effective Assistance of Counsel

....

29. The court finds that [West's] trial counsel's performance included, but not limited to: a motion for discovery; a motion to have updated reports on the victim's drug and alcohol screens; a continuing objection to the testimony of Victoria Lynn Hart and State's Ex. 1; a motion for a mistrial which was denied by the court; a motion pursuant to TR 50 which was also denied; meeting with [West] prior to trial; investigation and preparation of the defense; and an adversarial testing of the State's case.

....

34. The court finds that Mr. Dodd is a skilled and experienced criminal defense attorney. He subjected the State's case to serious adversarial testing and taken as a whole counsel's performance was well within objective standards of reasonableness. Based on the review of the evidence and testimony at the hearing for post-conviction relief Mr. Dodd had a reasonable defense strategy in not suppressing [West's] statements because there was no confession or acceptance of criminal responsibility by [West] to suppress here.

[West] consistently denied culpability or liability for the victim's death. Mr. Dodd could reasonably believe such statements would be useful in expressing [West's] version of events to the jury without subjecting him to cross examination by the State. Further, the voluntary statements could assist the defense in countering State's witness testimony of certain neighbors of [West] at trial regarding facts at issue. Under the circumstances of the case at bar, the court finds [West's] criminal trial attorney offered effective assistance and there exists no error, deficient performance or prejudice which undermines confidence in the outcome of [West's] trial.

Id. at 76-90 (citations omitted). West appeals.

Discussion and Decision

West challenges the denial of his petition for post-conviction relief. Post-conviction procedures do not afford a petitioner with a "super-appeal." *See, e.g., Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). Rather, subsequent collateral challenges must be based on grounds enumerated in Post-Conviction Rule 1. *Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004). Further,

[t]he petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Further, the post-conviction court in this case entered findings of fact and conclusions of law in accordance with Indiana Post-Conviction Rule 1(6). A post-conviction court's findings and judgment will be reversed only upon a showing of clear error—that which leaves us with a definite and firm conviction that a mistake has been made. In this review, findings of fact are accepted unless clearly erroneous, but no deference is accorded conclusions of law. The post-conviction court is the sole judge of the weight of the evidence and the credibility of witnesses.

Fisher v. State, 810 N.E.2d 674, 679 (Ind. 2004) (quotation marks and some citations omitted).

In his petition, West alleged that he was denied effective assistance of counsel when his trial counsel failed to move to suppress any statement West made to the police after West invoked his right to counsel and his right to remain silent.

To establish a claim for ineffective assistance of counsel, a defendant must satisfy two prongs: First, the defendant must demonstrate that counsel performed deficiently; second, the defendant must demonstrate that prejudice resulted. *McCary v. State*, 761 N.E.2d 389, 392 (Ind. 2002) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). These two prongs present independent inquiries, either of which may be sufficient for disposing of a claim.

Deficient performance is representation that fell below an objective standard of reasonableness, committing errors so serious that the defendant did not have the counsel guaranteed by the Sixth Amendment. Consequently, our inquiry focuses on the attorneys' actions while remembering that isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Indeed, a strong presumption arises that counsel rendered adequate assistance.

State v. McManus, 868 N.E.2d 778, 790 (Ind. 2007) (quotation marks and some citations omitted).

"Reviewing courts should remain mindful that there are occasions when it is appropriate to resolve a post-conviction case by a straightforward assessment of whether the lawyer performed within the wide range of competent effort that *Strickland* contemplates." *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006). "[T]he decision of whether to file a particular motion is a matter of trial strategy, and, absent an express showing to the contrary, the failure to file a motion does not indicate ineffective assistance of counsel." *Glotzbach v. State*, 783 N.E.2d 1221, 1224 (Ind. Ct. App. 2003). "Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord that decision deference." *Conner v. State*, 711 N.E.2d 1238, 1248 (Ind. 1999). On appeal, we do not second guess

counsel's strategic decisions requiring reasonable professional judgment even if the strategy or tactic, in hindsight, did not best serve the defendant's interests. *State v. Moore*, 678 N.E.2d 1258, 1261 (Ind. 1997).

“When a suspect invokes his right to counsel during custodial interrogation, the police must stop questioning until counsel is present or the suspect reinitiates communication and waives his right to counsel.” *Edmonds v. State*, 840 N.E.2d 456, 460 (Ind. Ct. App. 2006) (citing *Miranda v. Arizona*, 384 U.S. 436, 469 (1966)), *trans. denied*.

The initiation of further communication by an accused is not by itself sufficient to establish a waiver of the previously asserted right to counsel. If the accused has initiated further communication, then the subsequent inquiry is whether there is a valid waiver of the right to counsel; that is, whether the purported waiver was knowing and intelligent under the totality of the circumstances. The “totality of the circumstances” test focuses on the entire interrogation, not on any single act by police or the condition of the suspect. We review the record for evidence of inducement by way of violence, threats, promises, or other improper influences.

Storey v. State, 830 N.E.2d 1011, 1018 (Ind. Ct. App. 2005) (citations omitted).

West contends that the police did not stop the interrogation as required under *Miranda* and all statement made after he requested counsel were inadmissible. Therefore, his counsel was ineffective in failing to move to suppress them because without West's admission that he was angry and grabbed Hart's throat there was insufficient evidence of guilt. The State asserts that West has failed to rebut the presumption of effectiveness. We agree with the State.

We find support for our decision in *Monegan v. State*, 721 N.E.2d 243 (Ind. 1999). There, the defendant was convicted of murder and sentenced to life imprisonment. The defendant appealed, alleging that his trial counsel was ineffective based on several alleged

errors. One allegation focused on counsel's failure to move to suppress a statement made by the defendant to police while en route to the police station: "How much time do you think I'm going to get?" *Id.* at 246. Our supreme court concluded that the defendant had failed to demonstrate that counsel's performance was unreasonable. In reaching this conclusion the court noted,

In light of other steps taken in this action, we cannot agree with Defendant's contention that defense counsel's strategic decision not to file a motion *in limine* rises to the level of ineffective assistance of counsel. *See Wickliffe v. State*, 523 N.E.2d 1385, 1387 (Ind. 1988) (considering all other steps taken to effectively represent the defendant, the defense counsel's tactical decision not to file motions in limine or motions to suppress did not constitute ineffective assistance of counsel). Defense counsel filed several other motions in limine: (1) to suppress an incriminating statement overheard by a State's witness, James York; (2) to exclude evidence linking Defendant to a Chicago drive-by shooting; and (3) to prohibit the admission of evidence relating to a stolen handgun that Defendant used to kill Deloney.

Id. at 251.

Monegan also argued that defense counsel was ineffective in failing to object to the police officer's testimony regarding the aforementioned statement. The court rejected this argument, concluding that the decision not to object was a tactical one made toward the goal of portraying the defendant as a confused, frightened young man. The court further explained that "[w]hile this may not have been the best strategy, we cannot say that it was unreasonable." *Id.* at 252.

Here, the post-conviction court found that West's trial counsel had substantial experience in criminal trials. App. at 78. The post-conviction court found that trial counsel engaged in extensive discovery, objected to the testimony of Victoria Lynn Hart and State's Exhibit 1, moved for a mistrial, made a motion pursuant to Trial Rule 50, and objected to jury

instructions. *Id.* at 76-77. Additionally, the State notes that trial counsel vigorously cross-examined the pathologist regarding his ability to accurately pinpoint the time of Hart's death. R. at 188-190. After reviewing the record, we agree.

The post-conviction court also found that even though trial counsel could not remember exactly why he had not attempted to suppress West's statements, counsel opined that "since [West] denied culpability throughout the interrogation it would be possible to put those statements into evidence and not subject [West] to any cross examination." App. at 78. The court concluded, "Mr. Dodd could reasonably believe such statements would be useful in expressing [West's] version of events to the jury without subjecting him to cross examination by the State. Further, the voluntary statements could assist the defense in countering State's witness testimony of certain neighbors of [West] at trial regarding the facts at issue." *Id.* at 87.

Schlieper testified that West threatened to kill Hart during an argument that ended abruptly. The Videotaped Interview shows that West was cooperating fully with the police while vehemently denying that he killed Hart. While the October 29 Statement reveals that West grabbed Hart's throat, we cannot say that it was an unreasonable strategy to concede that some violence occurred in order to negate Schlieper's more damaging account. That trial counsel's decision not to suppress West's statements was a conscious decision is a reasonable inference given that trial counsel asked to confer with West and did so before stating that he had no objection to the admission of the October 29 Statement, that trial counsel submitted the Videotaped Interview, and that trial counsel questioned Detective Nelson about West's request for a lawyer. R. at 264, 348. We therefore conclude that West

failed to carry his burden to prove he was entitled to relief by a preponderance of the evidence. Accordingly, we affirm the post-conviction court's denial of West's petition for post-conviction relief.⁷

Affirmed.

BAILEY, J., and NAJAM, J., concur.

⁷ West cited *Smith v. State*, 673 N.E.2d 768 (Ind. Ct. App. 1996), without indicating that transfer was granted and the decision reversed in *Smith v. State*, 689 N.E.2d 1238 (Ind. 1997). Once a Court of Appeals' opinion has been vacated, it may not be cited as law. *Hubbard v. Hubbard*, 690 N.E.2d 1219, 1221 n.2 (Ind. Ct. App. 1998); *see also* Ind. Appellate Rule 58(A) (stating that when transfer is granted by the supreme court, opinion is vacated except those portions that are expressly adopted or summarily affirmed). We remind West's counsel of their duty of candor toward the tribunal under Indiana Professional Conduct Rule 3.3 and their responsibility to carefully check all citations for precedential value.